UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY OF OAKLAND,

Plaintiff,

v.

WILLIAM ABEND, *et al.*,

Defendants.

_____/

No. C-07-2142 EMC

ORDER GRANTING IN PART AND DENYING IN PART CITY OF OAKLAND'S MOTIONS TO DISMISS

(Docket Nos. 4, 7)

This action consists of two cases that were originally filed in state court.

The first case, filed on September 19, 2006, was initiated by the City of Oakland against William Abend. In its amended complaint, the City alleged that Mr. Abend was the owner of certain real property and that he was using or permitting the use of the property for both the unlawful sale, storage, or manufacture of controlled substances and for lewdness and prostitution. The City asserted claims for drug abatement, red light abatement, and public nuisance. In response, Mr. Abend filed a cross-complaint against the City.

The second case, filed on October 31, 2006, was initiated by Mr. Abend and his wife Marcia against the City, the Office of the City Administrator, Deborah Edgerly (the City Administrator), Barbara Killey (an employee in the Office of the City Administrator), and Arturo Sanchez (an employee in the Office of the City Administrator) (collectively "City Defendants").

On April 6, 2007, the state court consolidated the two cases upon motion by the Abends and designated the first case the lead case. Shortly thereafter, on April 17, 2007, the City removed the

consolidated cases to this Court. The City is now moving to dismiss Mr. Abend's cross-complaint and the City Defendants are moving to dismiss the Abends' separate petition/complaint.

Having reviewed the parties' briefs and accompanying submissions, and all other evidence of record, the Court hereby **GRANTS** in part and **DENIES** in part the two motions to dismiss.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Abends' Petition for Writ of Administrative Mandamus and Complaint

In their petition/complaint, the Abends allege as follows.

The Abends are individuals residing in the City and County of San Francisco and are owners of certain real property in Oakland. *See* Pet. ¶ 3. From May 1994 to May 2006, the City did not provide any notice to the Abends that the property was a nuisance or that nuisance activities were occurring on the property. *See id.* ¶ 11.

On May 4, 2006, the City demanded a meeting with Mr. Abend. *See id.* ¶ 12. The purpose of the meeting -- scheduled for May 23, 2006 -- was for Mr. Abend to sign an agreement with the City regarding the property. *See id.*

On May 17, 2006, approximately a week before the meeting, the City wrote a letter to the Abends complaining of alleged drug- and prostitution-related arrests at or directly in front of the property. *See id.* ¶ 13.

The very next day, on May 18, 2006, the City issued a "30 Day Notice to Abate Letter" to the Abends. *See id.* ¶ 14 & Ex. A (letter, dated 5/18/06). The letter was authored by Mr. Sanchez, an employee in the Office of the Administrator. *See id.*, Ex. A. According to the letter, the City Attorney's Office and the Oakland Police Department had provided the Office of the City Administrator with evidence of nuisance activity at the property and were requesting that the property be declared a public nuisance. *See id.* The City concluded that the nuisance activity documented in the police reports "constitutes a public nuisance . . . in violation of Oakland Municipal Code section 1.08 et seq." *Id.* The Abends were therefore assessed a $3,000 nuisance case fee. The Abends were also advised that, "thirty (30) days from the date of this letter, the City may impose penalties of $1,000.00 a day up to $365,000 a year (pursuant to OMC Chapter 1, Section), unless the nuisance conditions are abated. . . . Failure to do so may result in the City doing

so and billing you for the costs." *Id.* The City further noted: "Fees, costs, payments, assessment, and penalties associated with [the City's] enforcement actions . . . shall be a charge against the property and the owners and, if not reimbursed immediately, shall become a special assessment/priority lien recorded against the property title and are recoverable through the property tax general levy and court action . . . ." *Id.*

The Abends had the right to appeal the determination of the City. As explained by the May 18, 2006, letter: "You have the right to appeal this determination to an independent administrative hearing examiner. In order to request an appeal you must . . . submit in writing the details upon which you base your claim that the City has erred or abused its discretion in these actions." *Id.* The form for filing an appeal was enclosed. *See id.* According to the letter, the Abends had until June 1, 2006, to appeal -- *i.e.*, two weeks -- or they would "waive [their] right for further administrative adjudication of the matter." *Id.* The form for filing an appeal provided similar information, stating, *inter alia*, that, "IF THE APPEAL AND FEE ARE NOT RECEIVED BY OUR OFFICE WITHIN 14 CALENDAR DAYS OF THE MAILING DATE OF THE NOTIFICATION OF THE ENFORCEMENT ACTION, OR IF THE APPELLANT FAILS TO IDENTIFY FACTS WHICH SUPPORT A CONTENTION THAT THE CITY HAS ERRED OR ABUSED ITS DISCRETION, THE APPEAL WILL BE DENIED WITHOUT AN ADMINISTRATIVE HEARING." *Id.* The form instructed the appellant to "BRIEFLY IDENTIFY HOW THE CITY HAS ERRED OR ABUSED ITS DISCRETION IN BRINGING THIS ACTION." *Id.*

On May 23, 2006, the Abends, along with their attorney and property managers, met with City representatives. *See id.* ¶ 16. At the meeting, the Abends were told that "they were required to sign a Compliance Agreement . . . regarding the PROPERTY . . . without an opportunity to confront those who had allegedly complained about the PROPERTY, or to view any of the evidence against them." *Id.* The City refused to discuss amendments to the Compliance Agreement and to listen to information about the Abends' efforts to address the activity at the property. *See id.*

On June 1, 2006, the Abends filed an appeal of the City's May 18, 2006, determination that the activity on their property constituted a nuisance. *See id.* ¶ 18; *see also* Defs.' RJN, Ex. A (appeal, dated 6/1/06).

Under the City's policies and procedures for administrative appeals, as soon as practicable after receiving a written appeal, the case manager will forward the appeal to the administrative hearing officer (AHO) for a determination of whether the appellant has, *inter alia*, briefly identified how the City erred or abused its discretion. *See* Pet., Ex. B (Administrative Appeals, Hearing Procedures II.B.11.A). "The AHO will have up to 30 days from the date the appeal is received by the City to recommend a hearing or deny the request." *Id.* If the AHO finds that the appellant has sufficient grounds for an appeal, then an appeal hearing is scheduled. *See id.* The hearing examiner "shall be appointed from a panel of persons qualified to conduct administrative hearings by virtue of [his or her] education, experience, or profession, including City staff not associated with applicable enforcement actions." *Id.* (Administrative Appeals, Hearing Procedures II.C.2). A hearing examiner "shall be disqualified . . . for bias, conflict of interest, or prejudice or any other reason for which a judge may be disqualified in a court of law." *Id.* (Administrative Appeals, Hearing Procedures II.C.3). At the hearing, the parties "have the opportunity to present evidence by oral or written testimony of witnesses and by submission of original or true copies of documents, records, photographs, or other written material." *Id.* (Administrative Appeals, Hearing Procedures III.E.1).

On June 29, 2006, the City informed the Abends by letter that the appeal was denied without a hearing. *See id.* ¶ 22 & Ex. C (letter, dated 6/29/06). The letter was authored by Barbara Killey, an employee in the City Administrator's Office. *See id.*, Ex. C. According to the letter, the Abends' appeal was denied for failure to state adequate grounds or facts showing that the City erred or abused its discretion in bringing the action. *See id.* A subsequent letter from Ms. Killey clarified that the denial of the appeal was final as of August 3, 2006. *See id.* ¶ 24 & Ex. D (letter, dated 8/3/06).

On July 6, 2006, the City wrote to the Abends, stating that they owed the City a total of $54,739 in civil penalties from May 18 through July 6, 2006. *See id.* ¶ 23.

On September 11, 2006, the City wrote to the Abends, stating that they owed the City $120,739 in civil penalties from May 18 through September 11, 2006. *See id.* ¶ 25.

Based on the above, the Abends asserted the following claims in their complaint (separate from their petition for a writ of mandamus): (1) violation of federal due process because the City's

administrative appeal procedures do not require a hearing; (2) violation of federal due process because the administrative appeal examiner, Ms. Killey, was not impartial; (3) violation of federal due process because, in initiating the nuisance enforcement action, the City Defendants acted in an arbitrary and capricious manner, without any factual findings or rational basis; and (4) violation of federal equal protection because the City Defendants selectively enforced City and local ordinances against the Abends that were not enforced against similarly situated persons and property owners.

B. Mr. Abend's Cross-Complaint

Mr. Abend's cross-complaint contains many of the same allegations as detailed above in the Abends' separate petition/complaint. In the cross-complaint, the following causes of action are asserted: (1) violation of federal and state equal protection by selectively enforcing state nuisance abatement laws against Mr. Abend that were not enforced against similarly situated persons and property owners; (2) violation of both the federal and state constitutions by taking property without just compensation; and (3) a violation of federal and state due process by filing the complaint and amended complaint without any factual findings or rational basis.

II. DISCUSSION

A. Subject Matter Jurisdiction

Although not an issue raised by either party, the Court, as a preliminary matter, must examine whether it has subject matter jurisdiction over the two consolidated cases.

If the cases were never consolidated, then the Court would not have jurisdiction over the City's lawsuit because no federal question was presented on the face of the City's complaint or amended complaint. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (noting that, under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint"). However, in the instant case, the two cases were consolidated, and there is case law that, "under certain circumstances, where two actions are consolidated into a single action, state-ordered consolidation may affect jurisdiction and removal." *In re MTBE Prods. Liability Litig.*, 399 F. Supp. 2d 340, 353 (S.D.N.Y. 2005). For example, where a state consolidation order destroys the identity of each suit and merges them into

one, then the consolidated case may potentially be removed if the consolidated case contains a claim over which removal is proper. *See id.* at 353-54.

In California, there are "two types of consolidation: a consolidation for purposes of trial only, where the two actions remain otherwise separate; and a complete consolidation or consolidation for all purposes, where the two actions are merged into a single proceeding under one case number and result in only one verdict or set of findings and one judgment." *Hamilton v. Asbestos Corp.*, 22 Cal. 4th 1127, 1147 (2000). In the instant case, the state court's consolidation order did not explicitly specify which type of consolidation was being established. However, implicitly, the order established a complete consolidation. Although the state court did not specify that only one judgment would be rendered, it consolidated the two cases for all purposes (the Abends asked in essence for consolidation for all purposes by asking that discovery, pretrial motions, and trial be consolidated), and the cases proceeded under only one case number. *See id.* at 1148 (concluding that two cases were completely consolidated in large part because "the court's order granting the motion was not limited to a consolidation for trial: rather the court declared that 'It Is Ordered that Action[s] Nos. 955576 and 975884 are consolidated as Action No. 955576'" and because a subsequent order from the court stated that there was consolidation for all purposes).

Because there was a complete consolidation, the two consolidated cases were properly subject to removal, in spite of the lack of a federal question on the face of the City's complaint and amended complaint, because the Abends' independent complaint asserts federal claims against the City. The Abends have not made any claim that there were procedural defects with the removal by the City justifying remand. *See Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1193 (9th Cir. 2003) ("hold[ing] that the district court cannot remand sua sponte for defects in removal procedure"). The Court therefore has subject matter jurisdiction over this litigation and proceeds to address the merits of the motions to dismiss.

B. City Defendants' Motion to Dismiss Abends' Petition/Complaint

As noted above, the Abends assert four causes of action in their complaint (separate from their petition for a writ of mandamus). The City Defendants argue that each of the four claims should be dismissed.

1. First Cause of Action -- Procedural Due Process

In the first cause of action, the Abends assert that their right to procedural due process was violated by the City Defendants. "A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001) (internal quotation marks omitted). According to the City Defendants, the Abends' claim for violation of procedural due process should be dismissed for two reasons: (1) because the Abends lack a cognizable property interest and (2) because the Abends were, as a matter of law, given adequate notice and opportunity to be heard with respect to the City Defendants' actions.

a. Property Interest

Although a violation of procedural due process must involve a deprivation of a constitutionally protected property interest (or liberty interest), property for purposes of the Due Process Clause can be different from property for purposes of the Takings Clause. In fact, "[t]he Due Process Clause . . . recognizes a wider range of interests as property than does the Takings Clause." *Pro-Eco v. Board of Comm'rs*, 57 F.3d 505, 513 (7th Cir. 1995); *see also Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1197 (10th Cir. 1999) ("[T]he fact that a grazing permit is not 'property' under the Takings Clause does not prevent the same permit (or its terms and conditions) from constituting 'property' under the Fifth Amendment Due Process Clause."); *Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 18 (1st Cir. 1999) ("An expectation that is not property for purposes of the Takings Clause may yet sometimes entitle the citizen to procedural protection, and substantive protection against arbitrariness, before the expectation is cut off by government action.") (internal quotation marks omitted); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir.1996) ("'Property' as used in the Just Compensation Clause is defined much more narrowly than in the due process clauses.").

For purposes of due process, "[p]roperty interests are not created by the Constitution but by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (internal quotation marks

omitted). "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). "[T]he identification of property interests under constitutional law turns on the substance of the interest recognized, not the name given that interest by the state." *Newman v. Sathyavaglswaran*, 287 F.3d 786, 797 (9th Cir. 2002).

The Ninth Circuit has "recognized a constitutionally protected property interest in a landowner's right to devote [his or her] land to any legitimate use." *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 949 (9th Cir. 2004) (considering the due process claim asserted by the plaintiff because it had alleged that "the alleged overzealous and selective regulation of Squaw Valley [by the defendants] interfere[d] with its use of its real property"); *see also Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990) (noting that county's rezoning deprived plaintiff of the commercial use of his land until he paid a substantial nonrefundable fee to apply to have his previous zoning designation reinstated; concluding that this "[l]oss of the use and enjoyment of his land deprived [plaintiff] of . . . a property interest."); *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 601 (3d Cir. 1995) (stating that, "in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached."), *overruled on other grounds by UA Theatre Circuit v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003); *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 285 (1996) (noting that city had, via a public nuisance abatement proceeding, barred plaintiffs from keeping ostriches and emus on their ranch; concluding that, "[i]n light of the [plaintiffs'] ownership interest in the ranch and the fact that [one plaintiff] partially owns the [birds] through his commercial ventures, the City's nuisance abatement proceeding sufficiently implicates a protected property interest").

Courts have also recognized a constitutionally protected property interest in avoiding fines and liens. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (stating that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are

sufficient to merit due process protection"; adding that "the property interests that attachment affects are significant" because "attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause"); *Cook v. City of Buena Park*, 126 Cal. App. 4th 1, 6 (2005) (stating that a landlord "undoubtedly" had a property interest in avoiding the lien provision and fines imposed by an ordinance).

Finally, a slander on title can also effect a deprivation of a constitutionally protected property interest. *See Beck Dev. Co. v. Southern Pac. Transp. Co.*, 44 Cal. App. 4th 1160, 1189 (1996) (noting that land was "disparaged" by the recommendation of the Department of Toxic Substances Control that there be a moratorium on proposed development of the property; adding that "the landowner's ability to sell or make use of the land would be inhibited" as a result and the landowner "has a sufficient, legally recognized and protected interest in its property and business to warrant similar due process protection [*i.e.*, similar to a person's interest in good name, reputation, honor, or integrity]"); *cf. WMX Techs., Inc. v. Miller*, 197 F.3d 367, 375-76 (9th Cir. 1999) (stating that "damage to the reputation of a business, without more, does not rise to the level of a constitutionally protected property interest"; distinguishing an earlier case where there was clearly "much more than an injury to the reputation of a business" -- *i.e.*, there was "actual, direct interference with business goodwill"); *see also Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting "the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause").[1]

Guided by the above, the Court concludes that the Abends have sufficiently alleged a constitutionally protected property interest which suffered a deprivation when the City issued the "30 Day Notice to Abate Letter" on May 18, 2006. Under the terms of the letter, the Abends were assessed a $3,000 nuisance case fee, which could be recovered through the property tax general levy, and additional substantial fines were threatened. *See* Pet., Ex. A (letter, dated 5/18/06).

[1] It is possible to distinguish *Beck Dev. Co.* and *Paul* on the grounds that they did not involve slander of title to land.

Furthermore, the Abends' property was declared a public nuisance, and, drawing all inferences in the Abends' favor, this declaration could impair the ability of the Abends to sell, finance, or lease the property.

The denial of the Abends' administrative appeal also effected a deprivation of a constitutionally protected property interest. After denial of the appeal, the Abends were informed that they owed the City penalties of more than $100,000. *See id.* ¶ 25. Per the "30 Day Notice to Abate Letter," these penalties, if not reimbursed immediately, would become a special assessment/priority lien recorded against the property title. *See id.*, Ex. A (letter, dated 5/18/06). Furthermore, under the terms of the letter, the Abends could be subject to additional penalties unless they abated the alleged nuisance and, if they failed to do so and the City did the abatement, the Abends could be billed for the costs. *See id.*

Furthermore, the deprivation of property is underscored by the fact that the denial of the Abends' administrative appeal effected a significant change in the relative legal positions of the parties and the legal rights possessed by the Abends as owners of the property. If, as the City Defendants contend, no fundamental vested right is at stake, then the scope of judicial review via administrative mandamus under California Code of Civil Procedure § 1094.5 is narrow. The Court's "inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in the light of the whole record." *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 32 (1974). In addition, on judicial review, evidence is generally limited to that in the administrative record, *i.e.*, the Abends would not be able to introduce new evidence in the mandamus proceedings. *See Pomona Valley Hosp. Med. Ctr. v. Superior Court*, 55 Cal. App. 4th 93, 101 (1997) (noting that augmentation of an administrative record is permitted "only within the strict limits set forth in section 1094.5, subdivision (e)"). In short, losing the administrative appeal may well have had an adverse material effect on the Abends' legal ability to protect their property interest.

b. Notice and Opportunity to Be Heard

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court stated that "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case

against him and opportunity to meet it.'" *Id.* at 348. To determine what procedural protections are required in a particular case, a court considers several factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335; *cf. People v. Ramirez*, 25 Cal. 3d 260, 269 (1979) (considering the same factors above as well as one additional factor, namely, "the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official").

The Supreme Court has indicated that these three factors are applied in light of the specific facts of each case -- and not, *e.g.*, to categories of administrative proceedings. *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("It is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (internal quotation marks omitted); *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) ("Due process, as this Court often has said, is a flexible concept that varies with the particular situation."); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1953) (Frankfurter, J., concurring) (explaining that due process is a general requirement that legal processes follow the forms of law, be appropriate to the case, and be just to the parties involved); *see also McGuinness v. Dubois*, 75 F.3d 794, 800 (1st Cir. 1996) (recognizing that "some particular case in the future may present compelling evidence that MCI-CJ's [across-the-board] policy of denying live testimony from inmate witnesses at a disciplinary hearing held in the West Wing violates due process," but "leav[ing] consideration of such a case where it appears presently to reside -- in the future"; "on the facts of this case," there was no due process violation); *Mohilef*, 51 Cal. App. 4th at 302, 304-05 (noting that, "[i]n this case, the denial of prehearing discovery did not result in an unfair hearing, nor did it prejudice the [plaintiffs'] case"; also noting that, while "[d]ue process may require an agency to subpoena witnesses where, absent their testimony, the agency's ultimate decision would be based

solely on their written reports," in this case, the plaintiffs did not provide the court with any information about who they wished to subpoena or what those witnesses might have said).

Although the City Defendants argue that, based on the allegations in the complaint, adequate process was given to the Abends, the cases cited by the City Defendants do not demonstrate that, as a matter of law, the Abends were given adequate process. *Friends of the Old Trees v. Department of Forestry & Fire Protection*, 52 Cal. App. 4th 1383 (1997), for example, does not even address the issue of procedural due process. *See id.* at 1391 (noting that "courts and commentators have found that purely documentary proceedings can satisfy the *hearing requirement of Code of Civil Procedure section 1094.5*, so long as the agency is required by law to accept and consider evidence from interested parties before making its decision") (emphasis added). Nor does *Del Mar Terrance Conservancy, Inc. v. City Council*, 10 Cal. App. 4th 712, 729 (1992) (simply discussing admissibility of evidence not contained in the administrative record).

Moreover, it is telling that the City Defendants have made no attempt to explain why process was adequate as a matter of law based on the three *Eldridge* factors above. The three factors require factual analysis and is not susceptible to a 12(b)(6) motion. *See Pavelich v. Natural Gas Pipeline Co. of Am.*, No. 02 C 3374, 2002 U.S. Dist. LEXIS 23946, at *15 (N.D. Ill. Dec. 12, 2002) ("Whether post-deprivation remedies are adequate is principally a question of fact, not appropriate for determination on a motion to dismiss."); *see also Sonnleitner v. York*, 304 F.3d 704, 713 (7th Cir. 2002) ("[M]inimum procedural due process requirements ultimately turn on a highly fact-specific inquiry."). For example, the second factor requires an assessment of the risk of erroneous deprivation and the probable value of additional procedural safeguards. In their administrative appeal, the Abends argued, *inter alia*, that the majority of nuisance activity occurred on public property and not their own property. In view of this fact-based issue, whether additional procedural safeguards such as a live hearing, discovery, subpoenaing of witnesses, cross-examination of witnesses, etc., would materially advance the reliability of the City's determination cannot be assessed in the abstract or in a vacuum. *See, e.g.*, *Robledo v. City of Chicago*, 444 F. Supp. 2d 895, 902 n.2 (N.D. Ill. 2006) ("[T]his matter is not appropriately decided on a motion to dismiss. For example, defendants argue that an additional hearing on these issues would be unnecessary because

these issues 'can be brought to City's attention without requiring a hearing.' The record before the court does not however, explain what informal procedures currently exist, why these procedures would be adequate to avoid erroneous deprivations, or that these procedures were made available to plaintiffs in this case. Furthermore, it would be inappropriate to decide plaintiffs' claims on facts that go well beyond the allegations of the complaint."). Likewise, the third factor -- *i.e.*, the burdens imposed by the additional procedural safeguards -- requires factual analysis.

Accordingly, the City Defendants' motion to dismiss the procedural due process claim is denied.

2. Second Cause of Action -- Due Process

In the second cause of action, the Abends assert that their due process rights were violated because Ms. Killey, the administrative appeal examiner, was not impartial.[2] The City Defendants contend that this due process claim should be dismissed because (1) the Abends do not allege a cognizable property interest and (2) the Abends do not adequately allege hearing officer bias. For the reasons stated above, the Abends have alleged a cognizable property interest, and therefore the Court turns to the issue of whether they have adequately alleged bias on the part of Ms. Killey.

The Court concludes that the claim of bias is not adequately supported, particularly under the pleading standard recently articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In *Bell Atlantic*, the Supreme Court held that an allegation of parallel conduct by major telecommunications providers was insufficient to establish a claim for relief for conspiracy under § 1 of the Sherman Act because parallel conduct was consistent not just with conspiracy, but also with "a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 1964. In so holding, the Supreme Court emphasized that the allegation of the complaint must state more than a possible claim; it must state a plausible one. *See id.* at 1965-66 (noting that "[f]actual allegations must be enough to raise a right to relief above the speculative level" and that there must be "plausible grounds" for a claim for relief).

[2] The Abends do not specify whether the due process violation is a procedural violation or a substantive one.

According to the Abends, Ms. Killey was not impartial for two reasons: (1) because she was reviewing the work of an employee in the same office (*i.e.*, the Office of the City Administrator) and (2) because she used to work as an attorney in the Neighborhood Law Corps ("NLC"), a division in the City Attorney's Office which is predisposed against property owners, and Mr. Sanchez as well as Laura Blair (of the City Attorney's Office) were also previously or currently affiliated with the NLC. Both of these allegations are insufficient to support a claim of bias.

First, the fact that the Office of the City Administrator was in effect both the investigator and the adjudicator is not enough to establish bias. As the City Defendants point out, in *Withrow v. Larkin*, 421 U.S. 35 (1975), the Supreme Court rejected "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication." *Id.* at 47; *see also id.* at 54-55 (same). If, in the instant case, Ms. Killey specifically was both the investigator and the adjudicator, then the Abends would have a stronger case, *see id.* at 52 (noting that, under the APA, "no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function" but that there is an "express[] exempt[ioin] from this prohibition for 'the agency or a member or members of the body comprising the agency'"), but there is no dispute that the investigator and adjudicator were different persons, though employed by the same City agency.

Second, the fact that Ms. Killey was formerly affiliated with the NLC is not enough to establish bias. Even if the Abends are right that the NLC is predisposed against property owners, that bias cannot be automatically imputed to Ms. Killey simply because she was once employed there. As the City Defendants note, judges are often former prosecutors but are not as a result automatically barred from adjudicating criminal matters. *See Soden v. Murphy*, No. 4:05 CV 1399 CAS DDN, 2007 U.S. Dist. LEXIS 32731, at *6 (E.D. Mo. Apr. 13, 2007) (citing cases in which "federal courts have held that, when a former prosecutor later acts as a judge, an appearance of bias or prejudice against the defendant or grounds to require disqualification of the judge do not automatically appear"). The Abends try to distinguish their case on the basis that the NLC targets landlords specifically whereas prosecutors act only "generally against crime," Opp'n at 13, but this distinction is not persuasive. For instance, the fact that a former prosecutor specialized in drug cases

would not disqualify her from later serving as a judge in trials involving drug charges. The bottom line is that, while a due process violation may be established without a showing of actual bias, there must be "special facts and circumstances present in the case before [the court demonstrating] that the risk of unfairness is intolerably high." *Withrow*, 421 U.S. at 58. The Abends, alleging nothing other than general circumstances from which they speculate bias, have not demonstrated that the situation as alleged presents a risk of unfairness that is intolerably high.

The Court therefore dismisses without prejudice the Abends' due process claim based on the alleged bias of Ms. Killey. To state a viable due process claim they will have to allege facts that are more specific and more suggestive of actual bias.

3. Third Cause of Action -- Substantive Due Process

In the third cause of action, the Abends claim that their right to substantive due process was violated as a result of the City Defendants' actions. The City Defendants contend that this cause of action is preempted by the Takings Clause. *See, e.g., Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996) ("Because the conduct that the plaintiffs allege is the type of government action that the Fourth and Fifth Amendments regulate, *Graham* [*v. Connor*, 490 U.S. 386 (1989)] precludes their substantive due process claim."). In turn, the Abends argue that the cause of action is not preempted based on *Lingle v. Chevron*, 544 U.S. 528 (2005).

The Court agrees with the Abends that the substantive due process claim is not preempted. *Chevron* makes clear that a substantive due process claim and a takings claim address two different matters. Substantive due process concerns the *legitimacy* of the government's actions; takings, on the other hand, concerns the *severity* of the burden that government imposes upon property rights. *See id.* at 539, 542 (noting that the "common touchstone" in the regulatory takings jurisprudence is the focus on the severity of the burden that government imposes upon private property rights and that the issue of whether government action substantially advances a legitimate public purpose "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights" or "provide any information about how any regulatory burden is *distributed* among property owners") (emphasis in original); *see also Consolidated Waste Sys., LLC v. Metro Gov't of Nashville*, No. M2002-02582-COA-R3-CV, 2005 Tenn. App. LEXIS 382, at *81

(June 30, 2005) ("As a general theory, the primary purpose of a takings claim is to enforce the constitutional protection against government deprivation of private property without just compensation. It is not an attack on the validity of the governmental action itself.").

In the instant case, the Abends have alleged facts challenging the legitimacy of the City Defendants' actions and therefore have sufficiently stated a claim for a substantive due process violation. *See id.* at *80-81 (June 30, 2005) (stating that a court should look at a plaintiff's "actual claims to determine if the substantive due process claims are in reality only recast takings claims" -- "[i]f not, they are separately reviewed according to applicable principles"); *see also John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000) (stating that a careful analysis must be undertaken in each case to assess the extent to which a plaintiff's substantive due process claim rests on protections that are also afforded by Takings Clause). They have alleged that the City Defendants' nuisance enforcement action lacks a factual or rational basis and is just a pretext to avoid the payment of just compensation for the taking of their property. *See* Pet. ¶ 60. The fact that the Abends refer to a taking does complicate matters somewhat; it raises the question of whether the Abends are trying to recast a takings claim as a substantive due process claim. However, *Chevron* suggests that there will often be a predicate substantive due process claim before a takings claim.

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation " in the event of *otherwise proper interference* amounting to a taking." Conversely, if a government action is found to be impermissible -- for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process -- that is the end of the inquiry. No amount of compensation can authorize such action.

Chevron, 544 U.S. at 543 (emphasis in original).

4. Fourth Cause of Action -- Equal Protection

In the fourth cause of action, the Abends allege that the City Defendants violated the Equal Protection Clause because they selectively enforced City and local ordinances against the Abends that were not enforced against similarly situated persons and property owners. The City Defendants argue that the equal protection claim should be dismissed because "selective enforcement of valid laws, without more, does not make [their] actions irrational." Mot. at 15.

Plaintiffs have alleged disparate treatment. While the City Defendants are correct that selective enforcement of a valid law by itself is not enough to give rise to an equal protection claim, the Ninth Circuit has explained that

> [a] plaintiff can establish a "class of one" equal protection claim by demonstrating that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Where an equal protection claim is based on "selective enforcement of valid laws," a plaintiff can show that the defendants' rational basis for selectively enforcing the law is a pretext for "an impermissible motive."

Squaw Valley, 375 F.3d at 944. "[A] plaintiff may show pretext by [demonstrating] that either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive." *Id.* at 946.

Here, the Abends have alleged that there was no factual (and hence no rational) basis for the City's declaration that the Abends' property was a nuisance. Moreover, they have alleged an improper motive on the part of the City Defendants -- namely, to avoid just compensation for the taking of the Abends' property. They have also alleged facts supporting an inference of improper motive -- *e.g.*, the "30 Day Notice to Abate Letter" was issued only one day after the City wrote a letter to the Abends complaining of alleged drug- and prostitution-related arrests at or directly in front of the property, and subsequently the City refused to discuss amendments to the Compliance Agreement and to listen to information about the Abends' efforts to address the activity at the property. *See* Pet. ¶¶ 13-14, 16. In effect, the Abends imply the City had no real interest in obtaining the Abends' cooperation. Whether this claim is credible is not at issue at this stage.

Accordingly, the Court denies the motion to dismiss the equal protection claim.

5. Preclusion

With respect to all four causes of action alleged in the complaint, *i.e.*, both due process and equal protection claims, the City Defendants argue in favor of dismissal on the basis that the claims could have been raised at the administrative level but were not and that the Abends should be therefore precluded from raising them now. In support of this argument, the City Defendants cite *Reid v. Engen*, 765 F.2d 1457 (9th Cir. 1985). In *Reid*, the plaintiff was appealing from a decision of the National Transportation Safety Board ("NTSB") affirming the suspension of her pilot certificate for 120 days. *See id.* at 1460. On appeal, the plaintiff raised several issues challenging the FAA Administrator's authority on statutory and constitutional grounds, none of which had been raised in the NTSB proceeding. *See id.*

As the Abends argue, *Reid* does not govern their case. In *Reid*, the Ninth Circuit was presented with the issue of whether the plaintiff failed to exhaust her administrative remedies in appealing a decision of a federal agency. *See id.* at 1460. However, the Abends have brought a claim under § 1983 against the City. In *Patsy v. Board of Regents*, 457 U.S. 496, (1982), the Supreme Court held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Id.* at 2568. The City Defendants did not make any argument in their reply brief negating the applicability of *Patsy*.

6. Injunctive Relief

The City Defendants apparently seek dismissal of the Abends' claim for injunctive relief on the theory that the Abends have failed to allege irreparable injury. While the scope of the injunction sought is not clear and may be subject to future motions, it appears that the Abends assert, *inter alia*, that the nuisance abatement laws have been selectively and vindictively enforced against them. *See* Pet. (Fourth Cause of Action); Cross-Compl. (First Cause of Action). If proven, the Abends may be entitled to an injunction against any further such discriminatory prosecution. *Cf. Murgia v. Municipal Court*, 15 Cal. 3d 286, 290 (1975). Standing might be established if unlawful motive were demonstrated, particularly in view of the prior abatement proceedings brought by the City which the Abends contend was also meritless. At this stage, since all the allegations must be taken

as true and reasonable inferences drawn in the Abends' favor, dismissal of their claim for injunctive relief is not appropriate.

7. Individual Liability

Based on the complaint, it is not entirely clear whether the Abends are suing the individual defendants in their official capacities only, in their individual capacities only, or in both capacities. The City Defendants argue, in effect, that they need clarity as to how the individual defendants are being sued. In their opposition, the Abends do not clarify the matter. The Abends should specify how the individual defendants are being sued. The parties should meet and confer to determine the most convenient way to address this problem (*e.g.*, the Abends could file an amended complaint or the City Defendants could serve an interrogatory on the Abends, with the Abends providing a response on an expedited basis).

8. Municipal Liability

In *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), the Supreme Court held that a municipality can be held liable under § 1983 for a constitutional violation by its employees or officials but only if it can be said that the violation results from the municipality's official policies or customs. *See id.* at 694 ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."). According to the City Defendants, the Abends have not made sufficient allegations regarding municipal liability in accordance with *Monell*.

The City Defendants' argument is not persuasive. First, as the Abends point out, "[t]he *Monell* Court set forth an 'official policy or custom' requirement to limit § 1983 *damage* awards against municipalities." *Chaloux v. Killeen*, 886 F.2d 247, 250 (9th Cir. 1989) (emphasis in original). In the instant case, the Abends have alleged only claims for prospective relief. The City Defendants did not contest this point in their reply brief.

Second, regardless of *Chaloux*, the Abends have alleged enough for municipal liability pursuant to *Monell* to survive a motion to dismiss. The Abends have alleged that the City Defendants' actions were in accordance with a custom, policy, or practice of the City. *See, e.g.*, Pet.

¶¶ 42, 52, 62, 74. While the City Defendants contend that the Abends have failed to identify the exact official policy, this argument is not persuasive at this juncture. First, there is no heightened pleading requirement of specificity regarding *Monell* allegations. Second, a single constitutional deprivation can be an official policy. *See Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). An isolated constitutional violation is an official policy for which a municipality can be held liable when: (1) the person causing the violation has "final policymaking authority," *see id.* at 1235-36; (2) the person causing the violation is a subordinate but his or her action is "ratified" by one with final policymaking authority, *see id.* at 1238; or (3) the person causing the violation is a subordinate but one with final policymaking authority is "deliberately indifferent" to the subordinate's action. *See id.* at 1240. That the Abends have not identified who the final policymaker of the City is or which City employee actually caused the constitutional violation is not a bar at this stage. That is something that discovery will inform. *See, e.g., Kase v. Wiseman*, No. 93-3076, 1993 U.S. Dist. LEXIS 14414, at *8 n.4 (E.D. Pa. Oct. 14, 1993) (rejecting argument that "§ 1983 claim against the City should be dismissed because plaintiffs failed to identify an official with final policymaking authority who violated Sandra Kase's constitutional rights"; noting that a heightened pleading standard does not apply in civil rights cases alleging municipal liability under § 1983). *But see Pivonka v. Collins*, No. 3:02-CV-0742-G, 2002 U.S. Dist. LEXIS 12211, at *9 (N.D. Tex. July 5, 2002) (agreeing with the city's argument "that the plaintiffs' claims must fail because they have not alleged any specific policymaker responsible for promulgating the policy or custom which led to the alleged constitutional violations"). Here, the allegations of the complaint imply that the administrative actions taken have been approved or ratified by a final policymaker as the City has not only formally acted on the administrative appeal but also sought to enforce its actions by bringing an abatement/nuisance lawsuit.

C. City's Motion to Dismiss Mr. Abend's Cross-Complaint

In the cross-complaint, Mr. Abend asserts claims for equal protection, a taking, and substantive due process. For the reasons stated above, the Court denies the City's motion to dismiss with respect to the equal protection and substantive due process claims. The only remaining issue is whether Mr. Abend has properly stated a claim for a taking.

The Court grants the motion to dismiss the takings claim because the claim is premature. Whether there has been a taking cannot be determined until the abatement/nuisance lawsuit filed by the City is resolved. As noted above, the crux of any takings claim is that the deprivation of property be sufficiently severe so as to rise to the level of a takings. Here, the burden on Mr. Abend's property cannot be assessed until the Court is able to determine what abatement, if any, is required or what use, if any, is enjoined. In this case, the "30 Day Notice to Abate" generally requires the Abends to abate the nuisance but does not specify the specific scope of the nuisance or the particular steps they must take. The "30 Day Notice to Abate" thus did not represent a "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson*, 473 U.S. 172, 191-95 (1985). Even if the City could be deemed to have taken a definitive position, it relies on its lawsuit to enforce the notice, and thus the severity of the burden on Abends' property cannot yet be measured. *Cf. City of Seattle v. McCoy*, 4 P.3d 159, 166-72, 101 Wash. App. 815, 827-39 (Wash Ct. App. 2000) (holding that court order of closure constitutes the taking); *see also Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1274 (8th Cir. 1994) (noting that "[t]he ripeness doctrine requires not only that the [City] arrive at a final, definitive position, but also that its decision inflicts an actual, concrete injury"). The current inability to define the severity of the burden precludes the finding of a "takings" whether the claim is for a public or private taking.

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III. CONCLUSION

For the foregoing reasons, the City Defendants' motion to dismiss the Abends' complaint is granted in part and denied in part. The Court dismisses without prejudice only the due process claim based on the alleged bias of Ms. Killey. The remainder of the motion is denied.

Likewise, the Court grants in part and denies in part the City's motion to dismiss Mr. Abend's cross-complaint. The Court dismisses without prejudice the takings claim. The remainder of the motion is denied.

This order disposes of Docket Nos. 4 and 7.

IT IS SO ORDERED.

Dated: July 12, 2007

EDWARD M. CHEN
United States Magistrate Judge